Supreme Court, U.S.
FILED

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NO.

IN THE

Supreme Court of the United States

WINSTON G. CHANDLER

Petitioner

V.

SECRETARY OF THE U.S. AIR FORCE, RAYMOND H. WELLAR, CHIEF OF CORRECTION BOARD, Mr. MARTHA MAUST, PANEL CHAIR.

Opponents

On Petition for Writ of Certiorari
To The Eighth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS

1. The Eighth Circuit Court of Appeals has entered a decision that has not been decided before on an important question of Federal Law. This should be settled by this court to clear up the confusion on whether all time served in the Army and Air Force is tied together for promotions? **Would this not be a basis for Federal Jurisdiction in the Court of First Instance**, or **First Impression?**

2. Is it a violation of the U. S. Constitution Art 1 #8 for the Board of Corrections of military Records, (hereinafter referred to as BCMR) to **ignore mandatory** laws and regulations passed by Congress for the corrections of Military Officers records on promotions, and then the Appeal Court to affirm their **illegal decisions, is this an abuse of discretion?**

3. Where copies of facts, laws and Court Cases involved in this type case were provided BCMR, and the District Court, and they still refused to follow the laws, and the Appeals Court affirmed their invalid decisions, **is this not an Arbitrary and Capricious Act?**

LIST OF PARTIES

[x]All parties of this case are on the cover page.

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BASIS FOR FEDERAL JURISDICTION

This case Comes from the Eighth Circuit Court of Appeals (Appendix B) that has decided an important questions of federal law that has not been decided in any other Court, but should be settled by this Court. It also conflicts with relevant decision of this Court, and other Appeals Courts on some other important points in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) amended on 1947-1954. See: §706-10 U.S.C.A. §1552.

OPINIONS BELOW

(i) The date of the Judgment subject to review was February 25, 2003. (No. 02-2053 EA) Chandler v. U.S. 320 F3d 828 (2003).

(ii) Date of rehearing denial was April 18, 2003.

(iii) District Court order July 16, 2002(No.400CV00572).

CONSTITUTIONAL PROVISIONS-STATUTES AND REGULATIONS(Hereinafter known as CPSR)

(1) United States Constitution Art 1 § 8. cl16.

"This was a plenary power granted to Congress by the Constitution, to raise and support Armies". "To

provide and maintain a Navy," "To make Rules for the Government and Regulations of the land and Naval Forces." Art.1 Sec 8, cls. 12-14.

(2) PUBLIC LAW 773-Coded10 U.S.C.A. 1552

Congress passed 10 U.S.C.A. 1552 to cover the rules and Regulation the services had been operating under from the beginning. Making them Statutory. (AR. 84)

(3) PURPOSE OF THE BILL Public law 773

The principle purpose of H.R.773 (Public Law 773) is to provide Officers of the Reserve Component a **Statutory basis** for promotions and elimination comparable to that of the Officers of the Regular component by the Officers Reserve Act of 1947. (emphasis added)(AR 65-Page2).

(4) Relationship to Existing Procedures

"This bill does not establish promotion and elimination that are basically new" See; §.216(a) of the Armed Forces Reserve Act of 1952. (emphasis added)(AR.65-Page 2)

(5) §308; ARMY-§509 U.S. AIR FORCE

§308 Each non-unit Officer in the grade of Second Lieutenant who is found by the Secretary or any officer to be designated to be qualified for promotion shall be promoted, effective on the date he has three

years of promotion service, regardless of a vacancy in the grade of First Lieutenant. (AR.93)

§509;(a) Except as provided in subsection (b) of this section, each officer of the Air Force Reserve in an active status in the grade of Second Lieutenant who is found qualified for promotion shall be promoted to the grade of First Lieutenant effect on the day he reaches 3 years of promotion service in grade.

(b) A Reserve Officer in the grade of Second Lieutenant who completes three years of Promotion service in grade and who is found not qualified shall be discharged.

(Petitioner was in both Army and Air Force for 21 years and 7 months and 14 days)

(6) ROPA 10 U.S.C. 8380 TITLE U.S.C. §;628-5A

States as follows: "To correct inequity in Officers Promotions before ROPA (1945) with qualified ratings not on active duty would be promoted as if he were on active duty. Said Officer will be presumed to recommended by their commanding officers for said promotions.

(7) TITLE V1i.MISCELLANEOUS PROVISIONS

See§ 702(b)-All Officers of the Army and Air Force serving in any grade (in case of Reserves Officers,

shall precede that on which he enters the Active service of the United States by a period equal to the total of (1) One year for each year of satisfactory Federal Service. "ACTIVE STATUS" means the status of a Reserve Officer who is not in the Active National Guard or inactive National Guard, or in the retired reserve. (All other point are in an Active state)(emphasis added)(AR.117)

(8) RESERVE PERSONNEL ACT OF 1946

§ 207(a) Of the Legislative Reorganization Act of 1946, as amended, provides for the correction of Military and Naval records. Secretaries of the Armed Services through Boards of civilian officers or employees of the respective departments, to correct errors or remove injustices. Action under this authority may, in some instances effect a retroactive promotion.

(b) EFFECTIVE Date of Promotion. This subsection provides that in carrying out the provisions of this title, a promotion may be made effective, before, on, or after the date accomplished.(emphasis added)(See;)(AR.70)

(9) ROPA INFORMATION SHEET.

(3) TOTAL COMMISSIONED SERVICE DATE(TFCSD) That date which reflects all periods of

Federally recognized commissioned service-The TFCSD will be the date you accepted your initial commission.

(10) PROMOTIONS PATTERNS.

-after he has served a prescribed maximum period of service in that grade his consideration becomes mandatory if he is qualified for the next higher grade.(AR.67)(emphasis added)

(11)Sec:510.Mandatory Consideraton

for Promotion to Captain, Major, and Lieutenant Colonel.

(a) Mandatory Consideration ....This sub-section prescribes for promotion of officers reaching specific career are points.

Grade for consideration.....Phases

Captain.....4 years in grade and 7 years service.

Major.....7 years in grade and 14 years service.

Lieutenant Colonel..7 years in grade and 21 years service (AR.No.79-2)

(12) Public Law 773—10 U.S.C. 1552.

Sec:501 (68 Stat) (Total years of service, means all periods of time a Reserve Officer: (A) has held an appointment as a commissioned Officer in any of the Armed Forces of the United States, without component or in any component thereof: (AR No 105)

STATEMENT OF THE CASE

Petitioner, Winston G. Chandler, is a Retired Air Force Major serving from August 6, 1944 to October 9, 1966.(AR16). He served as a Pilot, (Staff Supply Officer, and Staff Transportation in the Reserve.)

(Petitioner was released August 18, 1945 from Active duty(when World War II ended). He was assigned to the Organized Reserve Corp. which was Army Air Corp at that time.(AR58) Not Air Force as Appeals decision says)

Petitioner was promoted to First Lieutenant in June 1950(AR17), after the U.S. Air Force was created. This **was 2 years, 10 Months past the mandatory time** for the promotion, (which was three years, not the 5 years and 10 months). This caused Major Chandler to be in the wrong promotion zone. His Army Air Force time was not considered by the Air Force, as the Regulations called for (which was continuous in both services)

The promotion to Captain was February 3, 1955, (AR 18) which was also over the 4 years for the promotion. (6 Months over the mandatory time.) The Promotion to Major was February 3, 1962.(AR 23). Petitioner filed with BCMR asking for correction of the promotion to First

Lieutenant BCMR came back that there, **(had to be a vacancy** for a promotion to First Lieutenant.(AR40)).

Petitioner sent BCMR the Regulations and Court Cases, that said, "that **a vacancy was not required for promotion to First Lieutenant". (§ 13-f (AR.61).**

The next excuse was that **(promotions could not be made retroactive)(AR 9).** Major Chandler again sent the Law which said, **"Promotions could be made retroactive," (CPSR No. 8)(AR70)** This was a 1946 Act that is still in effect. **BCMR still refused to correct** the military records. Thereby denying again. **This was done with the correct law in their hands. They were acting arbitrary and capricious in not complying with the law.**

Petitioner filed suit in Federal District Court, Arkansas, Eastern Division on July 24, 2000. BCMR came with an answer saying, **"The Statute of Limitation had run."** The District Court agreed and dismissed the case October 4, 2000. Motion for reconsideration was denied October 30, 2000.(2)

Petitioner filed an appeal to the Eighth Circuit Court of Appeals November 13, 2000. The Appeal Court ruled the **District Court was wrong thereby, reversing the Court on the Statute part. Mandating** the Court

to **see if the law had been violated. If BCMR had been arbitrary and capricious.** (Appendix B)

June 26, 2001.(3)Opponents filed second identical motion for Summary Judgment on February 5, 2002, which was granted by the District Judge dismissing the suit again on July 16, 2002.(1)(Appendix No.,C)

Petitioner, Major Chandler filed another appeal to the Eighth Circuit Court of Appeals on September 4, 2002.

The Eighth Circuit Court panel issued a decision 2003.(3) Affirming the District Court dismissal. Rehearing was filed for on April 1, 2003, which was denied on April 18, 2003. (Appendix A)

REASON FOR GRANTING THE WRIT

This is an unusual case. It was made so by the continuous hunting a way to deny the petitioner his rights by BCMR.. All the issues the BCMR used **were false..!! First "that there had to be a vacancy for the promotion to First Lieutenant"** when AFT-45. 13-f made it false..Someone failed to read the Regulations. (AR. 36) (1) (2) (3)

Then BCMR came back with, "**a promotion could not be made retroactive. § 207 of the Reorganization**

Act of 1946, clears this up if you are trying to find the truth. This Act is still in effect today.

The Appeals Court agrees that "Retroactive promotions, and the three year, without a vacancy is in the law." Pub.L 773 the 1954 part of ROPA states the purpose is to equalize Regular and Reserve officers, (this includes Army and Air Force Office together) as provided in the 1947 Act..(AR 65-2). The Legislative History brings in § 207 of the 1946 Act clears up the Retroactive part of the Act.

ON QUESTION NO 1

The Honorable Eighth Circuit Court of Appeals in their February 25, 2003 decision in this case has brought **up a question of law that has not been decided by this Court or any other Court.** It needs to be brought before this Court for a clarification of the law, so the printed decision of this case will not become an erroneous precedent for the future that will effect many Officers in the same category as Petitioner.

The question that need an answer from this Honorable Court is **"Does the time served in both the Army Air Force, and the U.S. Air Force count together for the promotions of Military Officers"?**

The ruling in the Appeal Courts decision is NO. The Reserve Office laws have not been followed..

In the decision the Appeals Court said (appendix B)

"The Plaintiff initially became an officer at the time when the Air Force, then called the Army Air Corps was part of the Army, but this situation changed, and the Air force had become a separate service, well before ROPA Law."

Then the Appeals Court after the erroneous decisions by BCMR then turned around and said:

"We conclude, that our reviewing authority is not sufficient to set aside the decision of the Air Force Board for the Corrections of military Records. The Boards interpretation of the governing military Statutes are not unreasonable " (Appendix 7b)

BCMR was not correct on any of its argument, yet the Appeals Court gave them the right to continue to make up erroneous false decisions, and give Major Chandler the shaft. Let us now see what the governing statutes say:

(7) **TITLE V11 Miscellaneous Provisions, in Constitutional Provisions, Statures, Regulations)** [hereinafter known as **CPSR.**]

(7) §702(b) **All Officers of the Army and Air Force serving in any grade** – {in case of Reserve Officers,

shall precede that on which he **enters** active service of the United States by a period equal to the total of (1) year for each year of satisfactory service"}

"Active Service means the status of a Reserve Officer who is not in the Active National Guard, or inactive Guard, or in the retired Reserve.(AR117) See; (CPSR12)

(10) Promotions Patterns – after he has served a prescribed maximum period of service in that grade his consideration becomes **Mandatory** if he is qualified for the next higher grade. (AR. No.67)(CSPR 10)

(11) Sec; 501. Mandatory Consideration for Lieutenant Colonel. 7 years in grade and 21 years service, was ignored(AR.79-2) **(CSPR No. 11)**

(12) Public Law.773. Total years of service means all periods of time a Reserve Officer:

(a) **has held as appointment as a commissioned Officer in Any of the Armed Forces of the United States,** without component or in any component. (AR.No. 105)(CSPR No.12)

The question that this Court needs to confirm is, whether service in both the Army Air Corp and the U.S. Air Force should be counted together for promotions, where service has been continuous, which is the case of

the Petitioner, and as stated in the law. The Appeals Court is in-error in their opinion on this issue and has been unfair to Officer that fits in this category. (CPSR 7 & 12) And §702(b)

This is an issue that is a <u>first instance or first impression</u> since no other court has made a ruling on this law, and it needs to be cleared up by this Honorable Court.

ON QUESTION NO. 2

The U.S. Constitution Art 1 §8 gives the U.S. congress plenary power to make all laws and Regulations for the Military services, and Congress established Boards for the corrections of Military Records. (Hereinafter known as BCMR). In the case at bar, BCMR refused to correct Petitioner's Military Records that would give him a rank of Lieutenant Colonel with 21 years and 7 months and 14 days continuous service. **The Appeal Court has confirmed his erroneous decisions of BCMR and the District Court. When the BCMR** and the District court had in hand the Copies of the **Reserve Officer Laws** and **Regulations,** an **ignored <u>all</u>,** it certainly is a case **<u>of Abuse of Discretion.</u>** This was also overlooked by the Appeals Court in their decision. See : (4)(5)(6)

The Courts have not followed the intent of Congress in this case by not declaring an **ABUSE OF DISCRETION.** See (6)(7)

This decision is in violation of the U.S. Constitution, and should be reversed. BCMR has a **mandate to** make corrections of Military Records. Courts have said mistakes may be made but **Congress expects judicial authority to see that are corrected. The Appeals Court somehow became lost in the maze of Promotion Laws. Friedman v. U.S.** 310_F2d 403-04. Also see **Sanders v. U.S.** 594 F2d 817(4) (5)(6)(7).

(4) "Legislative intent is to do justice to those injured by the occassional Legal mistakes to be expected in administration of a vast personnel system which Congress expects to be brought in account by judicial authority when necessary" Friedman v. United States Supra, 310 F2d 403-04 and also see Sanders v. U.S. 594 F2d 81 §190g 10 U.S.C.A. §1552. Sanders v. U.S. 594 F2d 804.

(5) "Lower courts commits "abuse of discretion" if it bases its decision on erroneous legal standards or upon clearly erroneous findings. Stine 254 B.R.244 Affirmed 19 Fed." Appx 626 9th Circuit (2000).

(6) "an abuse of discretion" reviewable on appeal is an erroneous conclusion and judgment, clearly against the logic and affect of the facts and circumstances or the reasonable, probable, and actual deductions to be drawn there from. Hollingsworth Tool Works v. Employment Security Review Bd of Ind. N.E.2d 362 367.

This is a case of abuse of discretion by BCMR not correcting the Records. They are commanded to make corrections, not deny. The Eighth Circuit Court of Appeal **Did not follow the intent of Congress in this case.**

See (6 and 7)

ON QUESTION NO. 3

Question No. 3 covers Arbitrary and Capricious

The **BCMR and District Court** both said, there was **no "retroactive in ROPA".** That time in the Army Air Force and Air Force Reserve started in the 1954 Act is a false assumption...**The Appeals Court also agreed that the District Court and BCMR were wrong on both items.** Yet the Appeals Court has been misled by argument of the Opponents. **Saying, "Major Chandler, did not apply in his case." (Appendix 4b), (8)(9) because Petitioner spent the first 2 years, and 10 months in the Army Air Force.**

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7) "Thus the ultimate burden should be on the party whose error and obfuscation of the evidence caused the problem in the first place; thus we repeat, the Correction Board's decision denying ntiff complete relief was Arbitrary, and Capricious, without rational basis, unsupported by substantial evidence, and contrary to law. Sanders v. U.S. 594 F2d 816-820.

It is clear that **Public Law 773 Sec:501, (68 Stat 1147) that <u>All time served</u>** as a Commissioned Officer in **<u>any service</u> counts together for promotions.** See (CSPR No. 12).

In the ROPA Act it refers to the 1952 Act §701: (Where it says on time in service). (1) It **covers All** Commission Officers.3) "Grade means, unless otherwise specified, the **permanent grade of a Reserve Officer.** (4) Points means points Credited under **§701 of the Army and Air Force. The Vitalization Equalization Act of 1948;** Also see § 216 of the 1952 Act, which, made promotion Regulations Statutory. 10 U.S.C. 507-511.

The purpose of the bill H.R. 6375, (CSPR 3) becoming Public Law 773, refers to the Officer Personnel Act of 1947. It can be seen that all the Acts were a way of making the promotion of military officers more secure. None has been repealed. See: CSPR No. 11 & 12)

(8) "Secretaries of the military departments have a duty as well as power to afford proper relief by correcting Military Records" Legislative Reorganization Act of 1946 §131-2 U.S.C.A. United States supra Boards have a statutory duty to determine where there has been error or injustice, and to grant through and fitting relief <u>Sanders v. United States</u> 594 F2d 817 (1979)

The Legislative Reorganization Act of 1946, provides for correcting of Military and Naval records and sets up Boards to make the corrections §207. **This is the Section that authorizes Retroactive promotion of Officers** and **makes it effective before** the accomplishing of the action. How the District Court and BCMR could miss this, when copies of the Acts were furnished to both parties? It looks like both the District Court and BCMR were arbitrary and capricious in this case because the Petitioner had gone to Appeal Court.

Taking all the above into count it can be seen that the **Court of Appeals misconstrued the facts and laws** in this case...Their statement on what §207 of 1946 Legislative Reorganization Act of 1946 is so clear that it cannot be misunderstood. Yet here is what the Appeals Court said in the 2003 decision.(See; Appendix 6b)

'We agree that the Statute may, in some instance, authorize a retroactive promotion, but the authority is a **general one.** It applies where for some legal reason, retroactive is required, or at least appropriate, under law in effect at the relevant time (emphasis added) (Appendix 6b)

Just what is the Court saying?. In all cases and Dictionaries it has been understood from the beginning that retroactive is **"correcting something that should have**

been done in the past" §207 makes (a)(b) make it clear when it was passed in 1946, it was to clear up mistakes made by the Military services so Officer would not be left outside by mistakes the service had made. **There is no other way this Act can be described.** Major Chandler was in this category. The Appeal Court was just plain outside of reason in their decision. **You cannot be partly retroactive!!!!**

What is "general"? It relates to the whole, kind, class, or order, Universal" Leuthol v. Branford 47 2d 41-45 **(It is a class or kind, and cannot be ignored. It is for promotions that had been missed before,** and the BCMR were ordered to correct by Congress, regardless of when the mistakes were made. **General is out of place in this case.**

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(9) States the case general. It is universal, whole, kind, class or order. Leuthol v. Banford. 47 2d 42-45 (It covers all, you can't be partly General!!!!!!)

(10) Army Board of Correction of Military records denying Plaintiff's application or correction of his military records was inadequate in that there was no satisfactory indication that the Board based its decision on a balanced consideration of all the evidence presented and available Werner v. U.S. 642 F2 404.

Petitioner is covered. He was in the Army Air Force and the U.S. Air Force for 21 years 7 months and 14 days, with a clean record. How can the Appeal Court let the BCMR deny him the correction mandated by Congress? Denying him his rank he worked all those years to qualify for.

The Appeal court uses "E.G. Bowen v. Georgetown University Hospital 488 U.S. 304 (1988) wrong as the case quoted said "if Retroactive is in the Act it is authorized." The Supreme Court allowed the retroactive part. In the Bowen Case the U.S. Supreme Court page 224, by one of the member on this Honorable Court said "it is important to note that the retroactivity limitation applies *only to rulemaking*" (Appendix 5b) Then the appeals Court went into the Administrative Act Procedures and tried to hid their obligation saying: **(Appendix 4b)**

"We must defer to the Air Force Boards interpretation of governing statutes, and accept that interpretation if it is reasonable regardless of how we might interpret the statues as an original matter—our review of Military agency's decision must be extremely deferential –due to the narrow scope under APA."

This argument is not valid. If this is correct, why did Congress in it Acts give the Courts a right to review and reverse erroneous decisions of BCMR.? Here we have a case where the BCMR and the District Court have ignored all the laws and facts in the case, ruling with no basis for their actions. This was agreed by the Appeals Court is wrong. Now the Appeals Court says you may be wrong in your decisions, be we cannot make a correction because you are a Government Agency. This is an erroneous argument. See: (11)(12).

This decision goes against every legitimate decision the United States Supreme Court has made on this type case, as well as other Appeals Court cases. See:(14)(15)

Congress new that the military would make mistakes , and sometime try to cover these mistakes The Courts were authorized to correct these mistakes.

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(12) 5 U.S.C. §706. The APA prescribes that an agency action is unlawful and may be set aside if it was "Arbitrary, capricious. In abuse of discretion, or not otherwise not in accordance with law (49 U.S.C.(4610(c)). Friends of Richard Gebour v. FFA 251 F3d 1185.

(13) Board for corrections may "In the interest of justice review and correct any military record" no matter how long ago alleged error or injustice occurred." Gever v. Marsh 26 CtCl 1446 (1992)

When BCMR and the District Court have been wrong on every item in this case, "the Statute of Limitation, the no promotion without a vacancy, and no retroactive promotions." Why, Why, How can the Apppeals Court justify their decision with the Chappell v. Wallace below. (14)(15)

Maybe the Courts hate to rule against Government Agencies, but the Courts duty is to Justice regardless of who it is. This has not been the course set by decisions in this case.(16)

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(14) "The Board is empowered to order retroactive back pay and retroactive promotions. 10 U.S.C. §1552(c) Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence. (c)Sanders v. U.S. 594 F2d 802 1979) Chappell v. Wallace 462 U.S. 303.

(15) "Action of the correction Board is subject to judicial reversal if it is arbitrary, capricious, unsupported by substantial evidence or erroneous in law." Horn v. Schlesinger 517 F2d 549.

(16) "Congress did not give Secretaries the raw power to correct military records as they might wish; on the contrary, this court has held that the Secretaries and their Boards must base their decisions to correct or not on substantial evidence and they may not act arbitrary, Furlong v. U.S. 152 F Supp 238-138CtCl 843. (emphasis added)

Next the Appeals Court tries to classify the retroactive to someone that is called to Active duty before a promotion could be made. This is not correct, the purpose of the bill (CPSR No. 3) places all Officers, Regular and Reserve in the same category for all promotions. This is Public Law 773.10 U.S.C.1552.(c)

One thing to keep in mind in this case at bar the decisions to be made by BCMR were not discretionary.

Discretionary would be for a promotion before the mandatory time. The promotion for the petitioner was mandatory if they had corrected the First promotion, because he had met the mandatory time and was qualified. This has been ignored by the Appeals Court. All Officers that met the mandatory time would be promoted. See;(16)(17)

Petitioner should not be penalized by the Armed Forces mistakes. Congress in its laws and regulations have made a clear path for the corrections of the Military's mistakes, and it is the duty of the Courts to review and reverse unjust decisions.

In this case remember BCMR had in their hands the laws, Petitioner had given them. So there is no way they can claim a mistake. If they knew this then they are

Arbitrary and Capricious, and have not followed the law. See ((17)18)

Petitioner realizes that this Honorable Court has lots of cases to consider. This Case is setting an illegal precedent. This effects not only the Petitioner but thousands of Military Officers that will be effected if it is allowed to stand. It is unfair, unjust and a travesty if allowed to stand.

The fact and the laws in this case are clear. The decision has left the Reserve Officer Major Chandler outside the protection and his civil rights guaranteed by the U. S. Constitution.

Petitioner, begs for Justice that the U.S. Constitution intended. The Appeals court made a big mistake in this case and this Honorable Court is the only ones that can correct this injustice.

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(17) Arbitrary and Capricious, a decision or action taken by an administrative agency or inferior court – unreasonable action without consideration or in disregard of facts or law or without determining principles. Elwood Investors Co. v. Behme 79 Misc. 2d 910. 361 N.Y.S. 2d 488

(18) "When a Military Correction Board fails to correct an injustice before it is acting in violation of its mandate, and such violation, contrary to the evidence, is arbitrary and capricious. Yee v. U.S. 512 F2d 1383-206 CtCl 388.

CONCLUSION

This Petitioner should be granted.

Respectfully Submitted

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-2963

Winston G. Chandler	*
Appellant	*Appeal from the
v.	*United States District
United States Air Force	*Court for the Eastern
Secretary, et. al.	*District of Arkansas
Appellees	*

The petition for the rehearing by the panel filed by the appellant is denied.

(513-010199)

April 18, 2003

Order Entered at the Direction of the Court: S/Michael E. Gans Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix B

United States Court of Appeals

For The Eighth Circuit

No.02-2963EA

Winston G. Chandler	*
Plaintiff-Appellant	*
v.	*
The United States Air	* On appeal from the
Forces Secretary,	*United States District
Defendant-Appellee	*Court for the Eastern
Raymond H. Wellar, Chief	*District of Arkansas
of the Correction Board:	*
United States Air Force	*
Martha Maust, Panel Chair	*
United States Air Force.	*
Defendants	*

Submitted: December 2, 2002

Filed February 25, 2003

Before Morris Sheppard Arnold, Richard Arnold and Fagg, Circuit Judge.

He was promoted to First Lieutenant in 1950, and thereafter to Captain and Major. He retired from the Reserve as a Major in 1966. As we shall explain somewhat more detail later, he claims that he should have been promoted to Lieutenant Colonel before retirement. The Air Force Board rejected this claim, principally on (4b Appendix B) the basis that Reserve Officers Personnel Act, of (3b Appendix B) 1954 (ROPA), Pub L. 773, 83d Cong.2d Sess.c.1257, 68 State. 1147, on which Mr. Chadler mainly relied, did not apply to this case.

Our review of the Board's decision is limited. We must defer to the Air Force Boards interpretation of governing statutes, and accept that interpretation if it s reasonable regardless of how we might interpreted the statutes as an original matter. This deference, is perhaps at its zenith when military matters are involved. Our review of a military agency's decision "must be extremely deferential because of the confluence of the narrow scope of review under the APA and military settings Henry v. United States Dept of the Navy 77 F3d 271-272(8th Cir. 1996)

The key to Plaintiff's argument is that he should have been promoted from Second Lieutenant in August

1947, after three years as a Second Lieutenant. Instead he had to wait until June 12, 1950, more than five years. If promotion had occurred earlier he would have retired as a Lieutenant Colonel rather than a Major. Plaintiff cites 308 of ROPA. 68 Stat. At 1135-36. This provision plaintiff argues, his subsequent promotions would also have occurred earlier, and he would have retired as a Lieutenant Colonel rather than a Major. Plaintiff cites Section 308 of ROPA. 68 Stat. At 1155-56. This provision (4b Appendix B) reads in full as follows:

> Sec.308. Each nonunit officer of the Army Reserve who is found by the Secretary or any officer he designates to be qualified for promotion shall be promoted, effective on the date he has three years of promotion service, regardless of a vacancy in the grade of first lieutenant.

The first time it rejected Mr. Chandler's application, the Board relied, in part, on the advisory opinion of an officer of the Air Reserve Personnel Center to the effect that under Air Force regulations in effect before 1950, officers could be promoted only to fill existing vacancies. Section 308 of ROPA, just quoted, seems clearly inconsistent with this view. It mandates promotions

Section 308 of ROPA, just quoted, seems clearly inconsistent with this view. It mandates promotions regardless of a vacancy in the grade of first lieutenant." But does Section 308 apply to this case? Mr. Chandler claims the promotion in question should have occurred in 1947. ROPA was not enacted until September 3, 1954, with a general effective date of July 1,1955. ROPA §701.68 Stat. At 1188. . Retroactive is not favored in the law, and a statute will not be construed to have retroactive effect unless its language or context rather clearly so indicates. E.G. Bowen v. Georgetown University Hospital 488 U.S. 204 (1988). (5b Appendix B)

Nothing is Section 308 itself indicates that it was intended to be retroactive. On the contrary, the provision expressly looks to the future, stating that certain officers "shall be promoted" (emphasis supplied) under certain conditions. Plaintiff contends that ROPA §207 supplies the necessary retroactivity. This appears to be a mistaken citation. ROPA §207, 68 Stat. At 1152, applied to "Reserve officers who are hereafter ordered to active duty" (emphasis supplied). Mr. Chandler does not fit this category. He has never, while an officer in the Reserve, been ordered to active duty, either before or after the

enactment of ROPA. The plaintiff also cites, however, Section 207 of the Legislative Reorganization Act of 1946, Pub L.No. 601, 79th Cong. 2d Sess. C 753,60 Stat. 812,837. This is a general provision authorizing the secretaries of the military departments, acting through civilian boards, to correct military or naval records where "necessary to correct an error or to remove an injustice." We agree with plaintiff that the statute may, in some instances, authorize a retroactive promotion. But the authority is a general one. It applied where, for some legal reason, retroactive promotions is required, or at least appropriate, under law in effect at the relevant time, or later enacted and made retroactive to that time. That legal reason, plaintiff contends, is found in ROPA §308, but as we have seen, that provisions applies (6b Appendix B) only to situations arising after the effect date of ROPA.

In addition to these problems of retroactivity, plaintiff's ROPA theory faces another difficulty which appears to us to be insuperable. ROPA §308, on which his argument mainly depends, is in TITLE 111 of the Act, which, see §301, "applies only the Reserve officers of the Army", 68 Stat. At 1153. When ROPA was enacted, the plaintiff was not in the Army. He was in the Air Force,

which is governed by TITLE V of ROPA, 68 Stat. At 1171-83. The plaintiff initially became an officer at a time when the Air Force, then called the Army Air Corps, was par of the Army, but this situation had changed, and the Air Force had become a separate service, well before ROPA became law.

We concluded that our reviewing authority is not sufficient to allow us to set aside the decision of the Air Force Board for the Correction of Military Records. The Board's interpretation of the governing military statutes was not unreasonable. The Board's action was not so far out of bounds as to be justly denounced as arbitrary and capricious. The Judgment of the District Court is Affirmed.

A true copy. Attest;

CLERK, U.S. COURT OF APPEALS, EIGHTH IRCUIT.

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IN THE UNITED STATES COURT

EASTERN DISTRICT OF ARKANSAS

EASTERN DIVISION

WINSTON G. CHANDLER PLAINTIFF

V. NO.4:00 cv00572

SECRETARY OF THE UNITED

STATES AIR FORCE DEFENDANTS

ORDER GRANTING SUMMARY JUDGMENT

Plaintiff brought this action alleging that during his military career an Air Force mistake prevented him from receiving promotions due him, and that the Air Force Board for Correction of Military Records failed to correct a mistake pursuant to the Reserve Officer Personnel Act of 1954. This court dismissed Plaintiff's action as time-bared under 28 U.S.C. §240, on reconsideration, the Court found that pursuant the Little Tucker Act U.S.C. §1346, the Court of Federal Claims, rather than the District Court, had jurisdiction over the Plaintiff's claim.

On appeal, the Eighth Circuit, affirmed in part and reversed and remanded in part finding that the District Court has jurisdiction under the Administrative Procedure Act to review the decision of the Air Force Board for the Correction of Military Records. The Eighth Circuit directed this Court to decide plaintiff's claim under the Reserve Officer Personnel Act, using the standard set forth in the Administrative Procedure Act.

Brief Fact

Plaintiff was commissioned a second lieutenant on August 6, 1944. He was promoted to first lieutenant on June 12, 1950. Plaintiff was promoted to Captain on February 3, 1955, and to major on February 3, 1962. Plaintiff retired in 1966. Plaintiff contends that he should have been promoted to first lieutenant in February 1946. Plaintiff alleges that had he bee promoted as required, he would have been in a different promotion zone, the effect of which would have allowed him a promotion to lieutenant colonel in 1954 and perhaps further promotions prior to his retirement.

Plaintiff filed his first request for relief with the Air Force Board for Corrections of Military Records in 1983. Following administrative consideration, the Board denied his claim, concluding that he had not been placed in the wrong promotion zone. Plaintiff asked for reconsideration of the Board's denial of his claim for relief in 1995, and again was denied relief. After a third request for reconsideration, the Board again denied relief on March 20, 1999. Plaintiff filed this action in July 2000.

Standard of Review

The standard of review to be applied by this Court is governed by the Administrative Procedures Act. 5 U.S.C. §§701-706(1976(APA) "A reviewing court is directed to hold unlawful and set aside agency actions, findings, and conclusions found to be...arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law or unsupported by substantial evidence." Chappell v. Wallace, 462 U.S. 296(1983). The standard is a narrow one. The Court may not substitute its own judgment for that of the agency.

Discussion

Plaintiff argues that he should have been promoted to first lieutenant in 1946 pursuant to the Reserve Officers Personnel Act of 1954. The Air Force Board for the Correction of Military Records concluded that there was no provisions for promotions boards in 1955 and the Reserve Officers Personnel Act (ROPA) which was passed in September 1954 did not become effective until July 1, 1955. The Board found that following the passage of ROPA, the Plaintiff was considered and selected by the first promotion board to the Reserve grade of Captain. Thus, regardless of when the Plaintiff was promoted to first

lieutenant, his date of rank to Captain and Major would not change since he was considered and selected by the first promotion board following the passage of the ROPA to the reserve grade of Captain.

Plaintiff argues tat the language found in the legislative history of the ROPA, Senate Report 83-2010, July 29, 1954, referring to Section 208 of the ROPA wherein it states: "this subsection provides that, in Carrying out the provisions of this title, a promotion may be made effective before, on or after the date accomplished" establishes the retroactivity of the Act. Section 208 of the ROPA specifically addresses the promotion procedure available where an officer is recommended for promotion by a selection board or is found qualified for Federal recognition in the next higher grade, but does not receive that promotion because he is removed from active status prior to such promotion. There is no indication that the language relied upon by the Plaintiff is intended to effect the applicability of the entire Act. Instead, the language is limited to the specific situation addressed in Section 208. Instead, Section 701 of the ROPA provides an effective date of July 1, 1955. There is no indication of congressional intent that the

ROPA be applied retroactively. The Congressional History of the ROPA reflects that the purpose of the Act was to provide for officers of the Reserve Component of the military a statutory basis for promotion, and elimination comparable to that provided for officers of the Regular Component of the military personnel act of 1947. The Legislative History states, "this bill does not establish promotion and elimination procedures which are basically new", but translation the regulations under which the military services are currently operating into a statutory form with important changes to the Army and the Air Force.

Retroactivity is not favored in the law. The presumption against retroactive legislation is deeply rooted in our history. *Bowen v. Georgetown University Hospital* 488 U.S. 204 (1988). Congressional enactments will not be construed to have retroactive effect, unless their language requires such a result Id. The Court finds no such language in either the ROPA or the Legislative History of the Act.

After carefully considering the Plaintiff's allegations and the record, the Court finds that the facts, taken in the light most favorable to Plaintiff do not support the conclusion that the decision of the Air Force Board for

Correction of Military Records was contrary to the law, and an abuse of discretion or arbitrary or capricious. As such, Plaintiff's relief is denied. Defendant's second motion for summary judgment(docket #19) is granted.

IT IS SO ORDERED this 16th day of July, 2002

Signed/James M. Moody

James M. Moody

United States District Judge

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